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EXAMINER

KIDWELL, MICHELE M

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAULA MARY SOSALLA, SHIRLEE ANN WEBER, AND
JENNIFER L.S. MISEK
Appellants

Appeal 2008-5009
Application 09/977062
Application Publication 2003/0073966
Technology Center 3700

Decided: September 30, 2008

Before RICHARD E. SCHAFER, SALLY GARDNER LANE, and JAMES
T. MOORE, *Administrative Patent Judges*.

LANE, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

The appeal is from a Final Rejection, 35 U.S.C. § 134, of claims 1-13, 15-17, 19, 20, 23, and 24, which are all of the pending claims. Claims 14, 18, 21, and 22 have been canceled. (*See* App. Br. 1). Appellant did not file a Reply Brief. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

The application was filed Oct. 12, 2001, and published as Application Publication 2003/0073966 (“Pub. 2003/0073966”) on April 17, 2003. The real party in interest is Kimberly-Clark Worldwide, Inc. (App. Br. 1).

The Examiner relied on U.S. Patent 6,297,424 (“Olson”), which issued Oct. 2, 2001, to reject all of the pending claims under 35 U.S.C. § 102(e). Olson is assigned to Kimberly-Clark Worldwide, Inc., the real party in interest of the instant application. Appellants did not argue against the prior art status of Olson. Appellants argued separately for the patentability of the following groups of claims: claims 1-3, 12, 13, and 19; claims 4-11; claims 15, 16, and 17, claim 20, claim 23, and claim 24.

II. LEGAL PRINCIPLES

Claimed subject matter is anticipated by the teachings of a reference under 35 U.S.C. § 102 only if the claimed subject matter is identically disclosed or described by the teachings of the reference. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989) (“The identical invention must be shown in as complete detail as is contained in the patent claim.”).

2. Figure 1 of Appellants' specification also depicts "permanent character graphics" 70, 72, 74, and 76 and "active object graphics" 78 (Pub. 2003/0073966 ¶ [0034]).

3. Appellants' claim 1 recites:

A disposable absorbent article having an area which is visible when the article is worn,
a color gradation in said area providing a coloration which varies in intensity over the area from a higher intensity of color to a lower intensity of color when the area is dry, and
a visible element separate from said color gradation and disposed in said area at a location where the coloration of said color gradation is of lower intensity or absent such that the visible element remains visible and is not obscured by the color gradation.

(App. Br., Claims Appx. 17).

4. The Appellants have argued that "color gradation" is "an area wherein the color intensity incrementally changes from an area of higher intensity to an area of lower intensity, presenting an entire area of which a gradation is visible" (App. Br. p. 6).

5. Figure 1 of Olson is reproduced below.

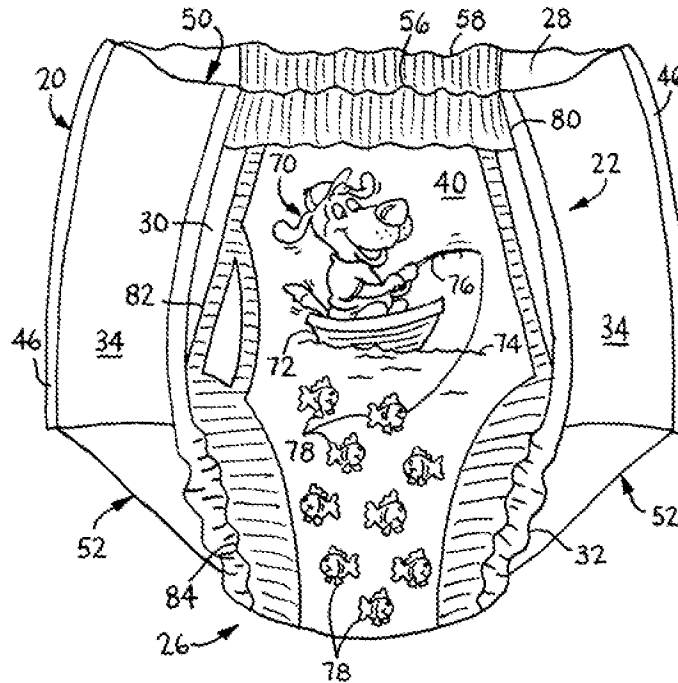


Figure 1 depicts a “training pant 20” with “permanent character graphics” 70, 72, 74, and 76 and “active object graphics” 78. (See Olson col. 13, ll. 14-23).

6. Olson describes the graphics displayed on the training pant, wherein

[t]he term "active graphic" as used herein refers to an appearing graphic, a fading graphic, or a combination of appearing and fading graphics. The term "appearing graphic" is used herein to refer to a graphic that becomes visible or becomes significantly more visible when exposed to urine, or that becomes visible or becomes significantly more visible with the passage of time when exposed to the environment but not exposed to urine. Conversely, the term "fading graphic" is used herein to refer to a graphic that becomes invisible or significantly less visible when exposed to urine, or that becomes invisible or significantly less visible with the passage of time when exposed to the environment but not exposed to urine.

(Olson col. 2, ll. 3-15).

7. Olson does not teach a training pant with a “color gradation,” as depicted in element 90 of Appellant’s Figure 1.

IV. ANALYSIS

Summary

The Appellants’ invention is simple. Appellants claim a diaper having a visible portion that is colored. The Appellants argue, and we agree, that the claim requires gradation of the color, i.e., the color is of a relatively high intensity fading to a color of lower intensity. (FF 3).

Olson, however, does not teach color gradation. (FF 6). Thus, Olson cannot anticipate the claims and we cannot affirm the Examiner’s rejection.

We have considered only whether the claims are anticipated by Olson and have not considered whether the claims might have been obvious in view of the specification of Olson, any claim of Olson or other prior art.

Discussion

The Examiner asserted that Olson teaches “a disposable absorbent article having a color gradation area providing a coloration which varies in intensity over the area from a higher intensity of color to a low intensity of color when the area is dry (one of fish 78)” (Ans. 3). The “fish 78” referred to by the Examiner is one of “a plurality of active object graphics 78 representing fish” on the training pant depicted in Olson. (See FF 4).

According to the Examiner,

Olson discloses in col. 2, lines 3-15 that the active graphic or fading graphic refers to a graphic that becomes invisible or significantly less visible with the passage of time when exposed to the environment but not to urine. Therefore, the color gradation change in intensity happens when the article is dry.

(Ans. 7). Thus, the Examiner considered the change in intensity of the graphics taught in Olson to present a “color gradation” in an area of the absorbent article.

While “active graphic” objects and “permanent graphic” objects change some aspect of their visibility in response to a variable such as wetness or time (*see* FF 5), the Examiner did not point to any description in Olson of a graphic that varies spatially over an area. We do not read Olson to teach that the active graphics, either appearing graphics or fading graphics, vary in color *over the area of the graphic*. While they may change intensity or color in reaction to a variable such as wetness or time, the Examiner has not convinced us that the color of the graphic in Olson changes spatially. We understand the graphics taught in Olson to change in response to a stimulus or over time, but not spatially over a prescribed area, as Appellants claimed.

Without disclosure of a coloration that varies spatially, the subject matter claimed is not identically disclosed or described by Olson and is not anticipated by Olson. *See Richardson*, 868 F.2d at 1236. Accordingly, the Examiner erred in rejecting claims 1-13, 15-20, 23, and 24 under 35 U.S.C. § 102(e) over Olson.

V. ORDER

Upon consideration of the record and for the reasons given, the Examiner’s rejection of claims 1-13, 15-20, 23, and 24 under 35 U.S.C. § 102(e) over Olson is REVERSED.

REVERSED

DISSENTING OPINION

SCHAFER, *Administrative Patent Judge*.

My colleagues reverse because the Olson reference does not describe
a color gradation in said area providing a coloration
which varies in intensity over the area from a higher
intensity of color to a lower intensity of color when the
area is dry

While I agree that the reference does not disclose this limitation, I think the
above limitation is directed to non-functional aesthetic features and, under
the particular facts of this appeal, should be given no weight in
distinguishing the claimed subject matter from the prior art.

I have no doubt that the limitation is directed to ornamental features.
Indeed, Appellants' specification emphasizes the ornamental nature of the
color gradation:

an absorbent article has been developed having a graduated
color feature which improves the aesthetic appearance of the
article. . . . The color gradient does not detract in any way
from the use of the article or the function of any indicator (e.g.,
wetness indicator) that may be employed with particular
embodiments Further, the color feature of the present
invention can be used with virtually any type of disposable
absorbent article.

Application 09/977,062, written description, p. 5, ll. 9-19. Appellants
further describes the aesthetic benefits of the color gradation:

The use of a color gradation (or gradient) on the pant is
beneficial for a number of reasons. For example, the
higher intensity coloration can be used to create
appearance features which increase the aesthetic
appearance of the article. The coloration makes the pant
appear more like colored underwear worn by older
children or garments worn by adults by providing a
portion of the front and back with moderately darker
color or a color pattern.

Application 09/977,062, written description, p. 10, ll. 25-29.

Appellants' written description attempts to create a functional relationship between the printed color gradation and the article. Where printed matter is not functionally related to its substrate, the printed matter will not distinguish the invention from the prior art in terms of patentability. *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983). In particular, Appellants say that the color gradation may make the article useful in toilet training:

in the case of a training pant, the use of this color feature allows the pant to be made to have a more attractive appearance, thus making the toilet training process more appealing to children.

Application 09/977,062, written description, p. 5, ll. 11-13. Appellants also urge the color gradation performs the "function" of concealing unsightliness.

The color feature can also be used to mask areas not intended to be seen, such as underlying anatomical features, bodily exudates, and/or interior structural components of the article itself..

Application 09/977,062, written description, p. 5, ll. 13-15.

The relationship of the ornamentation to the asserted functions are significantly different than those in *Gulack*. In *Gulack*, numbers printed on a band and the band itself were so interrelated as to create a product having a unique educational use not achieved by either the band or the numbers alone. In this case the combination of the printed color gradation and the article itself does not create a unique product. The product here is merely an absorbent article having a different decoration than the prior art. Neither of the asserted "functions" is the unique result of the color gradation on the article. Indeed, Olsen specifically teaches the use of ornamentation to assist

in toilet training. Olsen also teaches the use of permanent graphics on toilet training pants. Olson's permanent graphics, which are in areas visible while the pants are being worn, would implicitly hide some, if not all, unsightliness that might otherwise be apparent. Appellants' articles do not appear to perform any function not also performed by Olson's articles. The difference between the claimed article and Olson's resides only in the specific ornamentation. In my view, the color gradation limitation does not and can not patentably distinguish Appellants' article from those described in Olsen's patent.

The effect of the decision is to allow Kimberly Clark to repatent an old article by merely defining different surface ornamentation --a color gradation. I do not believe that such a difference is an adequate basis to issue an additional patent on an article that is structurally, functionally and operatively no different than the articles in the prior art. *Cf. In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004) (Holding that printed instructions included in a kit otherwise old, was not a patentable distinction and noting that, if it was a distinction, anyone could continue patenting a product indefinitely provided that they merely add a new instruction sheet to the product). I would affirm the decision of the examiner rejecting the claims under 35 U.S.C. § 102(e).

Appeal 2008-5009
Application 09/977,062

ack

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